

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Connect America Fund

WC Docket No. 10-90

A National Broadband Plan for Our Future

GN Docket No. 09-51

Establishing Just and Reasonable Rates for
Local Exchange Carriers

WC Docket No. 07-135

High-Cost Universal Service Support

WC Docket No. 05-337

Developing a Unified Intercarrier
Compensation Regime

CC Docket No. 01-92

Federal-State Joint Board on Universal Service

CC Docket No. 96-45

Lifeline and Link-Up

WC Docket No. 03-109

**COMMENTS OF
O1 COMMUNICATIONS, INC. & VAYA TELECOM, INC.**

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SUMMARY

O1 Communications, Inc. (“O1”) and Vaya Telecom, Inc. (“Vaya”) submit these comments to urge the Commission to reform the intercarrier compensation mechanism so that it functions smoothly, predictably, and without unnecessary litigation. Such reforms will benefit all carriers by establishing clear rules that will provide the certainty that market participants need to plan their business and expand their network.

As a first step, the Commission should simplify the legal and regulatory categories of traffic so as to limit legal disputes and provide regulatory certainty in the exchange of traffic. Currently, the complex web of state and federal rules that treat traffic differently based on the calling party’s location and the format in which the traffic originates is a major administrative cost. Further, it is an unnecessary cost given that, as the Commission has acknowledged, the function and costs of originating or terminating a call do not vary based on the type of provider originating the call or where the call originated. As part of its reform efforts, the Commission should develop a unified cost-based rate to simplify the regulatory system and reduce opportunities for improper arbitrage.

The Commission must also clarify the intercarrier compensation rules relating to services provided to IP-based application providers. The current lack of guidance from the Commission has resulted in improper arbitrage, confusion, and litigation that should be eliminated in the future. In adopting a unified cost-based rate, the Commission should make clear that the rate applies to traffic originating from and terminating to these application providers.

The Commission should also adopt policies that encourage carriers to reach negotiated interconnection and reciprocal compensation agreements. To the extent the Commission reduces regulatory uncertainty, that will eliminate points of contention between the parties. However, the

Commission should also consider imposing additional arbitration obligations on CLECs and CMRS providers to ensure good faith negotiations.

As part of its efforts, the Commission should adopt policies that encourage competition and the deployment of new technologies. In particular, the Commission must ensure that both telecommunications carriers and ISPs do not implement charges or policies that have the effect of unfairly limiting the ability of IP-based application providers to offer competing or complimentary services.

Finally the Commission must resolve issues relating to improper forms of self-help. One example of self-help involves the non-payment of access charges and intercarrier compensation, which can deny carriers necessary revenue. Another type of improper self-help occurs when carriers either refuse to route traffic to LECs or when LECs refuse to complete calls to their end users. Such practices pose a threat to the seamless and ubiquity of the network; consumers' calls to and from each other should not be pawns in resolving disputes between carriers.

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O1 Communications Inc. (“O1”) and Vaya Telecom Inc. (“Vaya”) submit these comments to the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceedings to encourage the Commission to take meaningful action to incentivize the evolution of the communications network towards an Internet-Protocol (“IP”) network and to simplify the intercarrier compensation system. O1 and Vaya urge the FCC to take advantage of the information provided in response to its Notice of Proposed Rulemaking to adopt a new

regulatory framework that will remove market distortions and provide regulatory certainty and consistency in the telecommunications sector.¹

I. INTRODUCTION

A. About O1 Communications, Inc.

O1 is a California facilities-based competitive LEC and IXC. Founded in 1998, O1 had the initial objective of providing next generation data telecommunications services to Internet Service Providers (ISPs). Over the years, O1's service offerings have evolved with the industry to include wholesale bandwidth, PSTN trunking, and Session Initiation Protocol (SIP) services, which they provide to a variety of customers. Today, O1's network provides SIP trunking and peering gateways that receive, transport, and switch traffic in IP format.

SIP services, like those offered by O1, exemplify the flexible and innovative technologies that should represent the core of the Commission's intercarrier compensation reform efforts. Session Initiation Protocol (SIP) extends the open-standards spirit of the Internet to all types of communications over IP networks, enabling disparate computers, phones, televisions and software to communicate. Using SIP, service providers can freely choose among standards-based components and quickly harness new technologies. Users can locate and contact one another regardless of media content or the number of participants. SIP negotiates sessions so that all participants can agree on and modify session features, and can also be used to add, drop or transfer users. Allowing users to connect across any IP network (including wireline LAN and WAN, the public Internet backbone, or wireless service) and any IP device (phones, PCs, PDAs,

¹ *In re Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, NPRM & FNPRM, FCC 11-13 (rel. Feb. 2011) ("NPRM").

mobile handsets), SIP provides a wealth of lucrative new possibilities. These possibilities not only improve how businesses and individuals communicate, but they do so at lower cost to the consumer.

O1 has designed its service offerings to respond proactively to market and customer demands. O1 offers SIP origination and termination services on its own network in California, and peers with customers and service providers nationwide. O1 responds to the specific needs of its customers by working with them to design solutions based on their unique requirements. In particular, O1 specializes in helping VoIP providers create convenient and cost-effective peering arrangements, offering these providers a single destination for their SIP sessions to be routed for termination to the PSTN. O1 is able to provide these services through a variety of arrangements, including interconnection agreements with LECs in California, as well as a number of transport, origination, and termination agreements with other carriers and service providers. Given the high degree of competition in the wholesale and IP origination and termination sector, in addition to competing based on the quality of its services and extensive network, O1's competitiveness relies on the prices it can offer. Therefore, the establishment of an efficient, consistent intercarrier compensation system is vital to its business.

B. About Vaya Telecom, Inc.

Vaya is a wholesale, facilities-based provider of Session Initiation Protocol ("SIP") termination services in California. Vaya receives IP-based traffic from a wide variety of companies in IP-format (including nomadic and fixed VoIP service providers) over the Internet and through Vaya's own network, and then provides IP-to-PSTN protocol conversions services before terminating the traffic to the Public Switched Telephone Network ("PSTN") for delivery to its intended recipient. As part of this service, Vaya also provides low-cost transport for the traffic so as to provide the lowest possible costs to its clients. When Vaya cannot provide the

transport itself, it uses a variety of other carriers to provide the necessary services through its Least Cost Routing services, described below. Vaya only terminates traffic to the PSTN that originates on IP-enabled devices. Because Vaya operates its own facilities and makes extensive use of least-cost-routing technologies, it is able to offer competitive rates and high-quality services.

C. O1's & Vaya's Use of Least Cost Routing

When O1 and Vaya cannot route a call to its intended recipient over their own networks, they generally route the call to its intended recipient using the lowest cost route available to it. In order to provide the best possible service to its customers at the best possible prices, O1 and Vaya take advantage of least cost routing ("LCR") technologies. Carriers taking advantage of LCR typically sign numerous interconnection agreements with each other that specify the terms under which they do business. These agreements define the terms of payment, methods, and settlement procedures, as well as establish the method by which the carriers will notify each other of pricing changes. Carriers then use LCR technologies to select the lowest-cost path to the called party based upon the other carriers' rates, which can be updated on a monthly, weekly, or even daily basis. In this way, carriers can ensure the lowest possible costs for the traffic they route and provide the lowest possible quotes for their customers, and in turn obtain greater market share. These widely used techniques and technologies provide great savings to consumers and encourage efficient use of the network. However, to work properly, they require a predictable, smoothly functioning intercarrier compensation system.

D. O1's and Vaya's Interest In The Proceedings

O1 and Vaya both originate traffic to and terminate traffic from the PSTN on behalf of a wide range of customers that conduct business over IP-based networks, including the Internet. By providing cost-effective alternatives for IP-PSTN conversion and PSTN connectivity, carriers

like O1 and Vaya are essential for providing IP-based application providers with the connectivity services they require to offer affordable, cutting-edge services to consumers across the country. These consumers run the gambit of possible end users, and include individuals, small business, large corporations, and universities that are looking for lower costs and advanced technological capabilities.

Because O1 and Vaya both pay and receive intercarrier compensation, they have a vested interest in a smoothly functioning network and the business model that drives it. As such, the current regulatory uncertainty and the increasing prevalence of self-help in the industry threaten O1's and Vaya's ability to plan their business and expand their network. In particular, IXC's and LEC's vary greatly in their treatment of IP-originated and IP-terminated traffic and CMRS traffic, and these differences can lead to price fluxuations and disparities based not on services, network structure, or any other area where carriers can exercise control, but on obscure regulatory classifications that have little or no technical impact on the routing of traffic. Further, it is impossible to compete fairly in this market as traffic classification can actually depend less on the nature of the traffic than on the market power of the party insisting upon the classification, with large carriers capable of forcing smaller carriers to accept the larger carrier's terms or risk disconnection from the network.

In addition, the complex web of state and federal rules that treat VoIP, CMRS, interstate, intrastate, and local calls differently is a major administrative cost for both O1 and Vaya. This has resulted in O1 and Vaya, like many carriers across the country, becoming engaged in a number of billing disputes. In some cases, this had led to litigation. In other cases, this has forced O1 and Vaya to write off debts that, under the rules, should have been paid. In this environment, it is difficult for both O1 and Vaya to grow and expand their networks as the

business case varies based on the vagaries of the legal conclusions of self-interested third parties. Clear rules, vigorously enforced at all levels of the government, would provide the certainty necessary to grow the network and ensure that consumers can take advantage of the most cost-efficient and flexible solutions technology can offer.

II. THE COMMISSION SHOULD STREAMLINE THE ENTIRE INTERCARRIER COMPENSATION SYSTEM

The intercarrier compensation principles proposed by the Commission in the NPRM, while useful, are inadequate to ensure that telecommunications markets function properly. In the NPRM, the Commission proposes intercarrier compensation rules that will: (1) make affordable broadband available to all Americans and reduce waste and inefficiency; (2) promote fiscal responsibility; (3) require accountability; and (4) transition to market-driven and incentive-based policies. However, while these broad principles, in and of themselves, are unobjectionable, they do not provide any meaningful direction for intercarrier compensation reform.

Instead, the Commission should focus on developing guiding principles to ensure that the relationship between carriers functions smoothly and that consumers' calls reach their intended recipients. To that end, O1 and Vaya propose the following additional principles: (1) legal and regulatory categories of traffic should be simplified to limit legal disputes and provide regulatory certainty; (2) carriers should be encouraged to reach negotiated interconnection and reciprocal compensation agreements, and states should be empowered to conduct binding arbitration when carriers refuse to negotiate in good faith; and (3) the intercarrier compensation rules should encourage competition and the deployment of new technologies. In addition, the Commission should take steps to address impermissible forms of self-help and ensure the integrity and seamlessness of call routed on the network.

A. The Commission Should Simplify Legal And Regulatory Categories of Traffic So As To Limit Legal Disputes and Provide Regulatory Certainty

1. The Commission Should Reduce The Number Of Categories of Compensable Traffic

In disputes before the Commission, before state PUCs, and before courts throughout the country, carriers are engaged in disputes over the proper classification of traffic. These disputes, however, have little or nothing to do with the actual cost of terminating the traffic. Indeed, as the Commission notes, the costs associated with terminating (or originating) a call do not vary based upon the jurisdictional nature of the call, but rather are essentially identical.² Despite this similarity in origination and termination costs, the current system requires carriers to divide traffic into a myriad of different legal categories (*e.g.*, interstate, intrastate, interMTA, intraMTA, ISP-bound, local), and encourages carriers to charge different prices based on these purely-legal distinctions. This practice does nothing to facilitate network functions, but does encourage billing disputes and litigation between carriers as to how traffic should be categorized. Indeed, the stakes of such litigation can be extremely high – the amount of intercarrier compensation owed by one carrier to the other can vary by a factor of ten or more, based not on the work performed in originating or terminating that traffic, but rather on the traffic’s legal classification.

Further, exchanging traffic with other carriers based on these legal distinctions conflicts with how services are actually provided to consumers, and indeed runs counter to both consumer expectations and the price signals they receive. More and more consumers, accustomed to wireless service and VoIP service offerings, expect all calls to be handled either on a flat per minute-of-use basis (such as most CMRS carriers offer) or as part of an overall flat rate for all

² NPRM ¶ 495.

calls (such as most VoIP providers offer).³ From December 2008 to June 2010, interconnected VoIP subscriptions increased by 32.9%.⁴ In roughly the same period, the percentage of Americans living in a household with at least one cell phone subscription increased from 85% to 89%.⁵ In contrast, during that same period, traditional switch access line subscriptions (which generally charge on a per-minute of use basis) decreased by 13.3%.⁶ The growth in non-usage sensitive consumer offerings and the decline in the traditionally user-sensitive switched access services shows that consumers are now largely removed from the traditional legal categories of traffic. In this environment, continuing to rely on these legal distinctions to govern the relationship between carriers can only result in market distortions, inefficiencies, and arbitrage opportunities as carriers must attempt to match the services they are committed to offering consumers in the marketplace with an intercarrier compensation system that has not kept pace with market changes.

As part of any meaningful overhaul of the intercarrier compensation system, the Commission must rationalize and simplify the entire mechanism by which carriers reimburse each other for the termination of traffic, and limit these types of compensation disputes as much as possible. To the extent that Section 251(b)(5) of the Communications Act of 1934, as amended (the “Act”), provides authority for the Commission to develop rules to govern how carriers exchange all types of traffic and to require carriers to enter into agreements for the

³ Jerry Ellig, *Inter-carrier Compensation and Consumer Welfare*, Journal of Law, Technology & Policy, 105 (2005).

⁴ Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of June 30, 2010*, at 2, Fig. 2 (March 2011).

⁵ Stephen Blumberg & Julian V. Luke, *Wireless Substitution: Early Releases of Estimates From the National Health Interview Survey, January - June 2011*, Center for Disease Control, Table 1 at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf>.

⁶ *Id.*

exchange of that traffic, O1 and Vaya believe that a reciprocal compensation regime with a limited number of categories makes sense for a rapidly evolving telecommunications services sector.⁷ Simplifying the categories of traffic will also reduce the duplicative and costly network arrangements many ILECs currently require to exchange traffic. Today, some ILECs require that carriers establish disparate networks to separately route different categories of traffic to the ILEC POI. These requirements drive up costs unnecessarily for both carriers and consumers, increase administrative overhead, and provide no corresponding benefits to consumers. No reasonable justification exists for these requirements or the disparate treatment of traffic, and these requirements serve only as a barrier to entry and as an additional revenue source for the ILECs. As the Commission addresses the overly-complex manner in which traffic is categorized, it should also take steps to address network interconnection requirements so as to encourage the provision of new and innovative services by existing carriers and new entrants, as further discussed in subsections (b) and (c) below.

2. The Commission Should Develop a Cost-Based Unified Rate for All Traffic

Given that the actual costs associated with exchanging traffic does not vary based on the type of provider originating the traffic or where the call originated, the Commission should develop a methodology for calculating a cost-based unified rate for all traffic.⁸ A unified cost-based rate would benefit consumers, including IP-based application providers, by providing increased predictability in rates and would reduce the number of disputes regarding intercarrier

⁷ NPRM ¶ 513 (“[The Commission] believe[s] that the Commission could apply section 251(b)(5) to all telecommunications traffic exchanged with LECs, including intrastate and interstate access traffic. Thus, the Commission could bring all telecommunications traffic (intrastate, interstate, reciprocal compensation, and wireless) within the reciprocal compensation framework of section 251(b)(5), or determine a methodology for such traffic.”).

⁸ *Id.* ¶¶ 495, 619.

compensation. It would also create a marketplace where carriers competed for customers based on service offerings, price, and quality of service without the market distortions caused by unequal regulatory treatment.

If developing a single unified cost-based rate is not possible, then even a merely reduced set of categories will limit opportunities for arbitrage and lessen incentives to engage in compensation disputes. Further, the benefits of a reduced number of traffic categories will accrue regardless of whether the Commission or the state PUCs ultimately retain per minute-of-use charges for traffic or adopt flat rate charges.⁹ To the extent that a single unified rate would prove insufficient for carriers in some rural, insular, or high-cost areas to recover their costs, those costs could be recovered through the USF or its successor.

3. Carriers Should Be Entitled To Compensation For Originating Traffic From And Terminating Traffic To IP-based Application Providers

Technological innovation since the last major revision of the Act in 1996 has created a number of new telecommunications services that do not fit easily within the existing intercarrier compensation regime. For instance, today many consumers purchase access to the PSTN through IP-based companies that do not provide their own protocol conversion service to the PSTN, and may not even be telecommunications carriers as defined by the Act.¹⁰ Instead, these IP-based companies purchase protocol conversion services from companies like O1 and Vaya so that their customers can obtain access to the PSTN.

As a result, the exact role played by each party in the call flow can no longer be clearly delineated within the existing compensation mechanism.¹¹ As the Commission noted, “there is

⁹ *Id.* ¶¶ 529-532.

¹⁰ 47 U.S.C. § 153(44) (defining “telecommunications carrier”).

¹¹ *See, e.g., Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 871-72 (S.D. Iowa 2005) (examining whether carrier was an IXC or transiting carrier); *WWC License, L.L.C. v.*

considerable dispute about whether, and to what extent, interconnected VoIP traffic is subject to existing intercarrier compensation rules.”¹² This has only been exacerbated by rulings at the federal and state levels reaching different outcomes.¹³ Further, as the Commission notes, “[t]hese disputes have been costly and resulted in uncertain or unexpectedly reduced revenue streams.”¹⁴ O1 and Vaya have been involved in a number of these disputes, and the costs have resulted in delays expanding their service areas and deploying their networks.

The Commission needs to act to resolve the uncertainty surrounding this issue by making it clear that for all types of traffic, application providers are “end users” (rather than “telecommunications carriers”) for the purpose of determining intercarrier compensation. This should be true regardless of whether the application is typical fixed voice service (like that provided by Comcast and Verizon over their IP-based networks), nomadic VoIP service (like that provided by Vonage or Skype over a third-party IP-based networks), video conferencing or calling conferencing services, or other IP-enabled services.

As part of its resolution of this issue, the Commission should explicitly reject contentions by IXC and other carriers seeking to avoid payment that originating or terminating access charges only apply if the LEC has a direct relationship with the calling or called party. For example, in a call from a POTS provider to a nomadic VoIP user, IXCs have claimed that, for

Boyle, Docket No. 4:03-CV-3393, 2005 WL 3676515 at *6 (D.Neb. Jan. 20, 2005) (same); *Atlas Tel. Co. v. Corp. Comm’n of Okla.*, 309 F. Supp. 2d 1299, 1310 (W.D. Okla. 2004) (same).

¹² NPRM ¶ 613.

¹³ *Compare PAETEC Commc’ns, Inc. v. CommPartners, LLC*, No. 08-0397 (JR), 2010 WL 1767193, at *2-3 (D.D.C. Feb. 18, 2010) (finding the tariff regime inapplicable to VoIP traffic) with *Sprint Commc’ns Co., L.P. v. Iowa Telecomms Serv. d/b/a Iowa Telecom*, Docket No. FCU-2010-0001, Order (Iowa Util. Bd. Feb. 4, 2011) (finding that traditional, tariffed intrastate access charges apply).

¹⁴ NPRM ¶ 613.

intercarrier compensation purposes, no telecommunications carrier terminates the call. Instead, the IXCs allege that the carrier providing the PSTN-to-IP conversion is merely a transit carrier, passing off the call to an information service provider that cannot assess access charges.

However, this contention fails both on legal and policy grounds.

First, as a legal matter, it is well established that IP-based application providers can be “end users” for intercarrier compensation purposes.¹⁵ The fact that the information exchanged between the end user and the terminating carrier includes voice traffic in IP-format does not alter that legal conclusion. Second, as a policy matter, a finding to the contrary would slow the transition to an IP-based network and harm consumers by increasing costs for consumers using IP-services. Under the current system, for all traffic, the carrier delivering the call (usually an IXC) pays either access charges or reciprocal compensation to offset the terminating carriers’ cost of delivering the call to the intended recipient. When terminating traffic to an IP-based application provider, those costs include the terminating carrier’s costs associated with the PSTN-to-IP conversion and the routing to the end user. If terminating carriers providing those services cannot recover their costs in the typical manner from the delivering carrier, the terminating carrier will have no choice but to seek to recover these costs from their IP-based end users. These end users, of course, will pass on these higher costs to consumers that ultimately use the services. This will result in IP-based service offerings suffering a competitive disadvantage when compared to traditional switched access carriers (whose terminating costs are borne by the carrier delivering the traffic) and higher prices for IP-based services. This would

¹⁵ *In re Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685, 4689, ¶ 7 (2005) (“[Information Service Providers] are treated as end users for the purpose of applying access charges.”).

disincentivize consumers from using IP-based networks – exactly the result the Commission is seeking to avoid.¹⁶

The Commission should also take the opportunity to make clear that protocol conversion and the associated VoIP services provided by LECs are the “functional equivalent” of the access services provided by incumbent LECs pursuant to Commission Rule 61.26.¹⁷ Specifically, the Commission should make clear that VoIP providers provide the IP-based “functional equivalent” of tandem and local switching in routing the call to the intended recipient through IP switches. Further, carriers providing protocol conversion and VoIP services provide the services through virtual channels transmitted over the Internet or other IP-based networks which are the functional equivalent of incumbent LEC loops. As the Commission has stated, “Similar types of functions should be subject to similar cost recovery mechanisms.”¹⁸ The Commission has further noted that “To the extent a proposed regime would preserve distinctions between types of carriers or types of traffic, such distinctions should be based on legitimate economic or technical

¹⁶ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151 ¶ 4 (2001) (“[C]arriers have every incentive to compete, not on basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers, a troubling distortion that prevents market forces from distributing limited investment resources to their most efficient uses.”).

¹⁷ 47 C.F.R. § 61.26.(a) (3) (“Interstate switched exchange access services shall include the functional equivalent of the ILEC interstate exchange access services typically associated with following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.”).

¹⁸ *Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685, 4702, ¶ 33 (2005) (“2005 NPRM”).

differences, not artificial regulatory distinctions.”¹⁹ There is no reason for the Commission to abandon this policy now, and it should clarify its applicability.

4. Either Reciprocal Compensation Charges or Access Charges Must Apply To All Calls Terminated by a LEC

The Commission should also clarify that either reciprocal compensation or access charges must apply to all calls, regardless of whether or not the terminating carrier has an agreement with the originating LEC, IXC, or CMRS provider. As the U.S. District Court for the District of Columbia has described:

The reciprocal compensation regime was created by the Telecommunications Act of 1996 . . . which also retained the pre-existing access charge regime, but in a limited fashion. Under the 1996 Act, reciprocal compensation is the norm; access charges apply only where there was a “pre-Act obligation relating to inter-carrier compensation.”²⁰

All traffic fits into one of these two categories. The Act does not provide any other options for intercarrier compensation. As such, for all calls, one regime or the other must apply.

Despite this, some CMRS carriers have refused to pay charges for intraMTA traffic terminated by CLECs with whom they do not have a direct contractual relationship, arguing that in the absence of an agreement, CMRS carriers have no obligation to pay carriers for terminating their traffic.²¹ No basis for this claim exists. As the Commission has previously acknowledged, “section 20.11 and the Commission’s reciprocal compensation rules establish default rights to intercarrier compensation.”²² Indeed, Section 20.11(b)(2) of the Commission’s rules states that a

¹⁹ *Id.*

²⁰ *PAETEC Commc’ns, Inc.*, 2010 WL 1767193 at *3 (citing *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002)).

²¹ *See N. Cnty Commc’ns Corp v. MetroPCS California, LLC*, File No. EB-06-MD-07.

²² *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC

“commercial mobile radio service provider *shall pay* reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.”²³ Simply put, CMRS carriers are using the indirect nature of their interconnection and the LECs’ common carrier obligations to avoid payment. As part of intercarrier compensation reform effort, the Commission should make clear that carriers terminating traffic (including CMRS traffic) are entitled to compensation, regardless of the regulatory classification of the carrier.

B. The Commission Should Adopt Policies That Encourage Carriers To Reach Negotiated Interconnection And Reciprocal Compensation Agreements

Section 251(b)(5) imposes on all LECs a “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”²⁴ Further, Sections 201, 251, and 332 of the Act all impose obligations upon carriers to interconnect (directly or indirectly) with one another to allow for the exchange of traffic. In addition, through rulemaking, the Commission has required incumbent LECs to provide the option for competitive LECs to interconnect with the ILEC at a single POI in each LATA.²⁵ However, while these obligations have proven sufficient to ensure that, in most cases, a calling-party on one network can reach a called party on another network, the rules have failed to ensure that carriers can obtain such interconnection at reasonable rates.

Docket No. 01-92, Declaratory Ruling & Report & Order, 20 FCC Rcd. 4855, 4862, ¶ 12 (2005).

²³ 47 C.F.R. § 20.11(b)(2) (emphasis added).

²⁴ 47 U.S.C. § 251(b)(5).

²⁵ See *Application by SBC Commc’ns Inc., Sw. Bell Tel. Co. And Sw. Bell Commc’sn Servs., Inc., d/b/a Sw. Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket No. 00-65, Mem. Opinion and Order, 15 FCC Rcd. 18354, 18390, ¶ 78 n.174 (2000).

Indeed, both Vaya and O1 have sought to reach interconnection and reciprocal compensation agreements with a variety of carriers (in particular VoIP, CLECs, and wireless carriers) and been disappointed with the response. Currently, O1 and Vaya interconnect with most companies through their ILEC POI, with traffic transiting over the ILEC network. However, this method of interconnection requires both companies to pay significant transit charges to the RBOC, and often results in inefficient routing and increased costs for both carriers.

Unfortunately, when these carriers are approached about the possibility of direct interconnection, they make demands that make such interconnection infeasible. In some instances, carriers will agree to interconnection only if O1 and Vaya agree to pay compensation charges to which the interconnecting carrier would not otherwise be entitled, pay rates above those paid by the ILEC, or pay unsymmetrical rates for the origination or termination of traffic despite the existence of direct interconnection. In other instances, carriers insist that O1 or Vaya interconnect at the tandem, MSC, or even at the end office level, rather than at a single POI within the LATA, state, or portion of the country. Still others insist on a TDM interconnection point, even though both carriers operate IP-networks. These demands are unreasonable given the flexibility of modern networks and the limited costs associated with physical interconnection, and prevent the network from running efficiently.

In adopting intercarrier compensation reform, the Commission should look to develop rules that decrease the overhead associated with exchanging traffic with other carriers and that encourage the carriers to reach private agreements both with respect to intercarrier compensation and network interconnection. As discussed above, reducing the categories and complexities associated with jurisdictionalizing and categorizing traffic will help achieve this goal by limiting

opportunities arbitrage for disagreement. In addition, the Commission should consider whether to expand mandatory interconnection requirements to cover agreements between and among CLECs and wireless carriers. As these services continue to grow in popularity, interconnection between those carriers may be as essential to a well-functioning network and a competitive market as interconnection with the RBOCs.

In addition, IP interconnection issues are beginning to emerge as a point of contention between carriers and it is critical that such issues are addressed and resolved in a manner that promotes and enhances competition as well as an efficient migration to IP-based networks. The Act's interconnection provisions are technology-neutral and in order to "encourage the shift to IP-to-IP interconnection where efficient," the Commission should reiterate that requesting carriers are entitled to interconnect and exchange traffic in IP format with LECs where technically feasible and on terms equivalent to those which govern traditional interconnection.²⁶ At a minimum, the Commission should make clear that the rights and obligations of interconnecting carriers are protected by Sections 251 and 252 of the Act, even as the network architecture transitions from circuit-switched to IP.²⁷ Further, such interconnection and traffic exchange arrangements should be memorialized in interconnection agreements, filed publicly, and, and if necessary, approved in accordance with the requirements of Section 252. If carriers are unable to reach agreement on interconnection arrangements, open issues should be resolvable through binding arbitration.

²⁶ National Broadband Plan, Chapter 4 Recommendations.

²⁷ See Letter from Mary C. Albert, Assistant General Counsel, COMPTel, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket No. 10-143 (Nov. 1, 2010).

C. Intercarrier Compensation Reform Adopted By The Commission Should Encourage Competition and The Deployment of New Technologies

One of the great promises of the transition to IP-based communications technologies is the flexibility and innovation that these technologies provide. IP-based carriers and application providers, using a combination of their own network, new technologies, and the Internet, can provide services on a scale and of a nature previously only achievable by the nation's largest companies. However, if originating and terminating service providers are permitted unilaterally to implement policies or impose charges on new and innovative services such that the providers destroy the economic or social value of these services, it will discourage innovation, which provides the greatest economic and social benefits, because innovators will not be able to obtain appropriate value from their inventions.²⁸

As the Commission is aware, carriers (both IP-based and TDM) can (and some may) use their role as the last-mile provider of service to the consumer for improper purposes. As bandwidth demand increases and consumers become more reliant on IP-based networks for all their communications needs, a provider's ability to impose excessive and discriminatory fees on carriers wishing to reach the provider's customers could harm the growth of the content and applications marketplace. The National Broadband Plan recommended that the "FCC should carefully monitor compensation arrangements for IP traffic as the industry transitions away from per-minute rates, particularly in areas where there is little or no competition, to ensure that such arrangements do not harm the public interest."²⁹ O1 and Vaya urge the Commission to follow this recommendation.

²⁸ See Reply Comments of Google Inc., GN Docket No. 09-191; WC Docket No. 07-52 (filed Apr. 26, 2010).

²⁹ National Broadband Plan at 150.

Further, as the Commission considers intercarrier compensation mechanisms in light of the ongoing transition to IP based networks, the Commission should keep in mind that the transition to an IP network does not mitigate the high degree of control enjoyed by a service provider with respect to its customers. Indeed, even in instances where the services are provided over the public Internet, the service provider providing the underlying connectivity to the consumer may still have incentives to engage in behaviors that distort the market. As such, regulation may remain necessary in some instances. In addition, if the Commission moves away from the current regime based on minute-of-use charges, it should ensure that carriers cannot simply replace one form of improper control with another, whether by imbalanced peering arrangements, traffic management practices, or any other method. To the extent that the Commission is already monitoring the issue as part of its Open Internet proceedings, O1 and Vaya urge the Commission to consider the implications of these issues for IP-based telecommunications services as well as the implications for traditional information services.³⁰

III. THE COMMISSION SHOULD ADOPT RULES TO ADDRESS IMPROPER FORMS OF CARRIER SELF HELP

As part of its intercarrier compensation reform, the Commission should also develop rules to ensure that carriers do not engage in self-help behavior as a means of circumventing the Commission's intercarrier compensation rules. Examples of this kind of behavior include non-payment of access charges (rather than paying and disputing according to the terms of the tariff) and call blocking (refusing to deliver calls received from a particular carrier).

³⁰ See, generally, *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52.

Carriers are increasingly refusing to pay any intercarrier compensation charges to which they object,³¹ and this harms competition and retards the growth and development of the network. It also discourages negotiated agreements between carriers as non-paying carriers feel that they can flout the default tariff mechanism and simply avoid payment altogether. As an economic matter, carriers delivering traffic have every incentive to engage in self-help and simply to refuse to pay an originating or terminating carriers' invoiced access charges. Intercarrier compensation disputes are complex, expensive to prosecute, and take an extremely long time to complete. Indeed, there are access charge cases before the Commission that already have lasted more than four years, and there is little hope that the matters will be resolved soon.³² During this time, the non-paying carrier retains the disputed amounts, while the terminating carrier receives no compensation.

Indeed, this type of self-help provides particular benefits to IXC's and other similarly situated carriers, which by starving originating or terminating carriers of revenue, can force these carriers to accept unfavorable terms. As PAETEC recently described in its *ex parte* filing before the Commission:

[Some] interexchange carriers ... engaged in self-help the last time the Commission issued an order that allowed competitive local exchange carriers a safe-harbor step-down to lower intercarrier compensation rates. By withholding payment of all interstate access charges until a competitive local exchange carrier "voluntarily" agreed to flash cut to the end point of mirroring RBOC interstate rates, the self-help engaged in by the largest

³¹ See, e.g., *All Am. Tel. et al. v. AT&T*, File No. EB-10-MD-003, Qwest Opposition to Petition for Reconsideration, at 21, at 10-11 (filed Mar. 4, 2011) .

³² See *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, File No. E.B-07-MD-001 (filed May 2, 2007).

interexchange carriers served to override the reasonable transition period adopted by the Commission.³³

Indeed, those IXC's affiliated with LECs that serve in the same market as terminating LECs have additional incentive to engage in such behavior. As the Commission noted in its NPRM, many carriers (and small carriers in particular) rely on access charges as a revenue stream. By denying other competitive LECs the revenue from the access charges which those competitors need to fund their business and expand their service areas and offerings, a non-paying carrier can impose its own affiliated LEC's competitive position vis-à-vis the cash-strapped competitor.

As discussed above, CMRS carriers are also taking advantage of the indirect nature of their interconnection with CLECs by manipulating the Commission's rules to argue that they should be entitled to free intraMTA traffic termination. These arguments run counter to Commission Rule 20.11, basic principles of equity, and to the Commission's commitment to eliminating distinctions based on "artificial regulatory distinctions."³⁴

The Commission should make clear that this type of self-help is impermissible. Unfortunately, the Commission recently has tacitly approved such behavior, finding that AT&T's self-help does not violate the Act or Commission rules.³⁵ This will only encourage such behavior in the future, and result in additional delays in IP network deployment and will harm competition. As part of its intercarrier compensation proceeding, O1 and Vaya urge the Commission to issue rules limiting the right of carriers to refuse to pay tariffed access charges,

³³ Letter from Tamar E. Finn, Counsel for PAETEC, to Joel Kaufman, Associate General Counsel, Federal Communications Commission (Mar. 14, 2011), Enclosure A – Declaration of William Haas ¶ 8.

³⁴ 2005 NPRM, 20 FCC Rcd. at 4702 ¶ 33 ("To the extent a proposed regime would preserve distinctions between types of carriers or types of traffic, such distinctions should be based on legitimate economic or technical differences, not artificial regulatory distinctions.").

³⁵ *All American v. AT&T*, File No. EB-10-MD-003, 26 FCC Rcd. 723 (2011).

and instead require these carriers to assert their rights through legitimate legal channels such as the Commission's complaint process, the state public utility commissions, or the courts.

Another type of self-help the Commission should address is the blocking of traffic based on billing disputes. In the past, the Commission has made clear that call blocking is an unacceptable practice in all but the most exceptional circumstances.³⁶ Nevertheless, some IXCs and CLECs have refused to route traffic based on disputes relating to intercarrier compensation. For example, some IXCs have refused to route traffic to conference calling services. In other cases, LECs have blocked traffic received from IXCs or other carriers that refuse to pay access charges, even in cases of good faith disputes. Regardless of any justification, however, the Commission should clarify that call blocking is forbidden – the seamlessness and integrity of the network for consumers should be the overriding principle.

Regardless of how a call is routed, its purported classification, or over what trunk a call is delivered to the terminating LEC, the Commission should require that all calls be completed to the intended recipients. The Commission should not permit carriers to use their control over their customers (either on the origination side or the termination side) to force IXCs or other LECs to waive their rights under the intercarrier compensation or mechanism or risk having their calls blocked. The Commission, the state PUCs, and the courts should be the only appropriate venue for resolving such disputes. Consumers' calls to and from each other should not be pawns in resolving disputes between carriers.

³⁶ *In re Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, 9932-33, ¶ 24 (2001) (“If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through. We are particularly concerned with preventing such a degradation of the country's telecommunications network. It is not difficult to foresee instances in which the failure of a call to go through would represent a serious problem, and, in certain circumstances, it could be life-threatening. Accordingly, the public interest demands a resolution to this set of problems”).

CONCLUSION

O1 and Vaya applaud the Commission for initiating this proceeding, and are confident that the rules the Commission will adopt will ensure a pro-competitive and robust environment for all carriers while ensuring that consumers have access to the new technologies and services they desire.

Respectfully submitted,

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